Supreme Court, U.S.
FILED
NOV 13 2015
OFFICE OF THE CLERK

No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF REPUBLICAN CURRENT AND FORMER MEMBERS OF STATE LEGISLATURES AND CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

November 13, 2015

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE FIRST AMENDMENT DOES NOT DEPRIVE STATES OF THE POWER TO ENACT AGENCY-SHOP LAWS REQUIRING GOVERNMENT EMPLOYEES TO PAY THEIR FAIR SHARE OF THE COSTS OF COLLECTIVE BARGAINING.	6
II. THIS COURT HAS LONG RECOGNIZED THE IMPORTANT ROLE THAT FEDERALISM PLAYS IN OUR CONSTITUTIONAL STRUCTURE.	12
III. CONSISTENT WITH FEDERALISM PRINCIPLES, STATES SHOULD BE ABLE TO DETERMINE FOR THEMSELVES WHETHER TO ADOPT AGENCY FEE ARRANGEMENTS.	16
CONCLUSION	23
APPENDIX:	1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) ..... *passim*

Bond v. United States,
131 S. Ct. 2355 (2011) 13

Borough of Duryea, Pa. v. Guarnieri,
131 S. Ct. 2488 (2011) 7, 10

Brown v. Brown,
No. 6:15-cv-01523 (D. Or. complaint filed
Aug. 12, 2015) 22

Brown v. Glines,
444 U.S. 348 (1980) 9

Connick v. Myers,
461 U.S. 138 (1983) 11

Engquist v. Or. Dep't of Agric.,
553 U.S. 591 (2008) 4, 7, 10

Ex parte Curtis,
106 U.S. 371 (1882) 8

Garcetti v. Ceballos,
547 U.S. 410 (2006) 7, 9, 10

Gregory v. Ashcroft,
501 U.S. 452 (1991) 5, 12, 16

Harris v. Quinn,
134 S. Ct. 2618 (2014) 11, 20, 22

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 11

TABLE OF AUTHORITIES – cont'd.

Page(s)

Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.,
335 U.S. 525 (1949) 18

Mentele v. Inslee,
No. 3:15-cv-05134 (W.D. Wash. complaint filed Mar. 4, 2015) 22

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 5, 16

U.S. Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers,
413 U.S. 548 (1973) 9

United Pub. Workers v. Mitchell,
330 U.S. 75 (1947) 9

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 7

Texas v. White,
74 U.S. 700 (1868) 12, 13

Waters v. Churchill,
511 U.S. 661 (1994) 7, 8, 10

Winner v. Rauner,
No. 1:15-cv-07213 (N.D. Ill. complaint filed Aug. 17, 2015) 22

Constitutional Provisions and Legislative Materials

4 Annals of Congress 934 (1794) 8

TABLE OF AUTHORITIES – cont'd.

Page(s)

Cal. Gov't Code § 3543 2

Cal. Gov't Code § 3544 3

Cal. Gov't Code § 3546 3

U.S. Const. art. I 12

Books, Articles, and Other Authorities

2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 14

Charles Fried, *Federalism—Why Should We Care?*, 6 Harv. J.L. & Pub. Pol'y 1 (1982) 15

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 14, 15

Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469 (1993) 16, 17, 20

Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019 (1977) 15

James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546 (Jonathan Elliot ed., 1836) 8

TABLE OF AUTHORITIES – cont'd.

Page(s)

Joseph E. Slater, *The Court Does Not Know 'What a Labor Union Is': How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 Or. L. Rev. 981 (2000) . 17

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) 4, 13, 14, 15

Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* (5th ed. 2014) 17, 20, 21

The Federalist No. 3 (John Jay) (Clinton Rossiter ed., 1961) 14

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 4, 15

INTEREST OF *AMICI CURIAE*[1]

Amici are 47 Republican current and former state legislators and one Republican former member of Congress. *Amici* are familiar with the statutory schemes governing labor relations and collective bargaining in their respective States, and they appreciate the significant role that States have long played in determining the content of their own labor laws. They are also familiar with the many reasons why decisions about the substance of those laws are best made at the state level, by individuals who are familiar with the unique needs and interests of each State.

Amici believe that nothing in the Constitution prohibits the agency fee arrangements at issue in this case and that whether these arrangements are good policy is a decision that belongs to the relevant state and local governments. It is also a decision on which jurisdictions can and do differ. After all, no one arrangement will make sense for every State in the country, and state officials will be best able to weigh the potentially competing interests of public employers, public employees, unions, and the public to determine what makes the most sense for their State. State officials have a particularly strong interest in making these determinations because they are held democratically accountable for providing effective and

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

efficient state government services through the work of public employees.

Some *amici* state legislators come from States that allow for agency fees like those at issue in this case. These *amici* have a particularly strong interest in representing their constituents and the many other governmental leaders in their States who have determined that these agency fee arrangements make sense for their States and help ensure ordered labor relations that benefit employers, employees, and the public. Moreover, *amici* have a strong interest in avoiding the significant disruption to carefully calibrated labor schemes that would result in the nearly half of States that permit agency fees if this Court were to conclude that these agency fee arrangements are no longer valid.

More generally, *amici* state legislators have a strong interest in ensuring that this Court respects the federalism values embedded in our Constitution and long recognized by this Court's opinions. Although *amici* take no position on the legal question whether Congress could legislate in this area if it so chose, they believe that Congress's decision to allow States to structure public sector labor relations as they see fit reflects federalism principles that are fundamental to our constitutional structure.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under California law, if a majority of the employees in a bargaining unit choose to be represented by a union, that union will serve as the exclusive bargaining representative for all employees in the unit, even those who choose not to join the union. Cal. Gov't

Code §§ 3543, 3544, 3546. Like many other States, California allows public sector unions acting as exclusive bargaining representatives to charge non-member state employees an agency fee, provided that such employees "have the right . . . to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." *Id.* § 3546(a).

This Court explicitly upheld States' authority to adopt statutory schemes such as this one nearly forty years ago in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, this Court recognized that "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." *Id.* at 223. Recognizing that its "province [was] not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment," the Court concluded that "important government interests" justified the "impingement upon associational freedom created by the agency shop [arrangement]." *Id.* at 224-25.

Despite this long-standing precedent, Petitioners argue that the question whether non-member governmental employees must pay agency fees—a question that *Abood* left to each individual State to determine for itself—may no longer be left to the States because the First Amendment compels one uniform answer for the entire country. This is plainly wrong. Petitioners' attempt to constitutionalize this aspect of labor relations is not required by the First Amendment, as Respondents' brief demonstrates, *see* Resp'ts' Br. at 15-31, and is inconsistent with the significant deference long accorded state determinations

about how labor relations in public sector employment should be ordered. Even when regulating speech and association protected by the First Amendment, "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 599 (2008), allowing state governments broad authority to manage their workforces effectively and efficiently. *Amici* state legislators understand well the significant policy judgments inherent in determining how States establish the law governing labor relations in public sector employment, and they appreciate the value of allowing individual States to determine for themselves whether agency shop arrangements make sense given the various competing interests at play in their States.

When the Framers drafted our enduring Constitution, integral to their design was a vibrant federalist system that empowered the federal government to provide national solutions to national problems, while preserving a significant role for State and local governments to exercise general police power and craft policies "adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987). As James Madison described it, the federalist system would "form[] a happy combination" with "the great and aggregate interests being referred to the national, the local and particular to the State legislatures." *The Federalist No. 10*, at 77 (James Madison) (Clinton Rossiter ed., 1961).

Because federalism permits decentralized decisionmaking in contexts where no other constitutional provision limits state action, there are many areas in which State and local policymakers can adopt policies

best suited to their local needs. There are also many contexts in which the States can serve as "laborator[ies]" of "experimentation," as Justice Brandeis famously put it. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This Court has long recognized these benefits of federalism, observing that federalism both "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and allows for "more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 458 (1991).

Consistent with our federalist structure and its commitment to allowing States to govern in areas where uniform national legislation is not necessary, key aspects of labor policy have long been left to the States. Indeed, as noted above, *Abood* itself recognized that the Court's role was not to assess the wisdom of Michigan's judgment that agency fee arrangements would best preserve ordered labor relations in that State, but simply to determine whether there was any specific constitutional bar to Michigan's decision. Concluding that there was not, the Court deferred to the judgment of Michigan state officials about how best to structure labor relations in that state.

Amici state legislators are responsible for determining the proper labor regimes in their respective States, and they thus appreciate the flexibility and discretion provided by this Court's decision in *Abood*. Indeed, as *amici* well understand, and as this Court recognized in *Abood*, "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex." 431 U.S. at 225 n.20 (quoting *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 234 (1956)). Based on their experiences serving in their

state legislatures, *amici* state legislators know that they and their colleagues in state government are best positioned to determine what regime will work best in their States. Moreover, *amici* state legislators who serve in the legislatures of States that have adopted agency fee arrangements like those adopted by California also know that a decision invalidating those arrangements would cause significant disruption in their States.

In sum, this Court recognized in *Abood* that the First Amendment does not require one uniform rule of labor relations for the entire country. Rather, deference should be given to the judgments of state policymakers about what rules would be best for their States. This Court should re-affirm that decision now.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT DEPRIVE STATES OF THE POWER TO ENACT AGENCY-SHOP LAWS REQUIRING GOVERNMENT EMPLOYEES TO PAY THEIR FAIR SHARE OF THE COSTS OF COLLECTIVE BARGAINING.

Urging this Court to overrule *Abood* and to strike down the laws of California and 23 other States, Friedrichs insists that the First Amendment prohibits a state from enacting an agency-shop law that requires non-member state employees to pay their fair share of the costs of collective bargaining. In Friedrichs's view, bargaining over the wages and hours of government employees is political speech, and therefore agency-shop laws must be subject to the strictest judicial scrutiny. *See* Pet'rs' Br. at 16-20. Neither constitutional first principles nor this Court's case

law supports this sweeping reinterpretation of the First Amendment.

The First Amendment's guarantee of freedom of speech, as construed in numerous decisions of this Court, gives considerable leeway to States to regulate their workforces to ensure that government runs effectively and efficiently. This Court has refused to apply the strictest standard of judicial scrutiny—a standard that often applies when the government directly regulates the speech of its citizenry—in favor of a lower level of scrutiny, because of the "unique considerations applicable when the government acts as employer as opposed to sovereign." *Engquist*, 553 U.S. at 598; *Waters v. Churchill*, 511 U.S. 661, 672-75 (1994); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 99-100 (1990) (Scalia, J., dissenting) ("[G]overnment employment decisions taken on the basis of an employee's speech do not 'abridg[e] the freedom of speech' merely because they fail the narrow-tailoring and compelling-interests tests applicable to direct regulation of speech." (internal citation omitted)).

By choosing to apply this lower level of scrutiny, the Court has ensured that the First Amendment's protection of speech is not so broadly construed that it intrudes into state managerial prerogatives in a manner "inconsistent with sound principles of federalism and separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006); *see also Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011) (rejecting interpretation of the Petition Clause that would "subject a wide range of government operations to invasive judicial superintendence" and "raise serious federalism and separation-of-powers concerns"). Friedrichs's argument, which relies heavily on many cases concerning direct regulation of speech by the

government as sovereign, cannot be squared with these principles. *See* Petr's' Br. at 16-18.

As this Court's case law makes clear, "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters*, 511 U.S. at 672. For example, the First Amendment, at its core, protects the "right of freely examining public characters and measures, and of free communication among the people thereon," *see* James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 554 (Jonathan Elliot ed., 1836), reflecting that "the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress 934 (1794). Nevertheless, this Court has long recognized that "[e]ven something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees." *Waters*, 511 U.S. at 672.

For example, in *Ex parte Curtis*, 106 U.S. 371 (1882), this Court upheld a federal criminal statute that prohibited federal employees from giving or receiving political contributions from other federal workers. The Court concluded that the statute was consistent with the First Amendment because it served "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service," *id.* at 373, and it rejected the dissent's argument that the statute unconstitutionally "prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views." *Id.* at 376 (Bradley, J., dissenting).

In 1947, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court upheld the constitutionality of the Hatch Act's prohibition on government employees participating actively in political management or political campaigns, reasoning that Congress's "conviction that an actively partisan governmental personnel threatens good administration" justified the statute's limitation on core First Amendment freedoms. *Id.* at 97-98; *see also id.* at 99 ("Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers*, 413 U.S. 548 (1973) (reaffirming *Mitchell).* In reaffirming *Mitchell*, this Court, once again, deferred to the considered legislative judgment of Congress, observing that "[p]erhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it." *Id.* at 567.

While the government may not "leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens," *Garcetti*, 547 U.S. at 419, this Court's case law establishes that "a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980).

Court precedent is clear that "constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."

Waters, 511 U.S. at 674. Thus, rather than applying strict scrutiny, this Court has held that First Amendment rights "must be balanced against the realities of the employment context," *Engquist*, 553 U.S. at 600, giving "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential." *Waters*, 511 U.S. at 673; *see also Garcetti*, 547 U.S. at 422 (noting "the emphasis of our precedents on affording government employers sufficient discretion to manage their operations"); *Guarnieri*, 131 S. Ct. at 2495 (noting the "substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees").

Consistent with these basic principles, this Court held in *Abood* that agency-shop laws that require government employees to pay their fair share of the costs of collective bargaining do not violate the First Amendment's guarantee of freedom of speech, upholding Michigan's judgment that "labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment." *Abood*, 431 U.S. at 229. Drawing on Congress's judgment reflected in the Railway Labor Act of 1926 and the National Labor Relations Act of 1935, *Abood* concluded that a state could constitutionally conclude that a union-shop arrangement provides an efficient and effective way to run its workplace and secure labor peace, one that balances the competing interests of all its employees. As *Abood* explained, such an arrangement "has been thought to distribute fairly the cost of [collective bargaining] activities among those who benefit, and it counteracts

the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) ("Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.").

Contrary to Friedrichs's claim, *Abood* is no outlier, but simply reflects basic well-recognized First Amendment principles—applicable to government regulation of its own employees—that give the government "'wide discretion and control over the management of its personnel and internal affairs.'" *Connick v. Myers*, 461 U.S. 138, 151 (1983) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); *cf. Harris v. Quinn*, 134 S. Ct. 2618, 2642 (2014) (refusing to defer to managerial judgment where "the State is not acting in a traditional employer role"). Friedrichs's claim that public-sector collective bargaining is inherently political does not change the basic constitutional calculus. Indeed, *Abood* properly recognized that "decisionmaking by a public employer is above all a political process," but properly held that, given the weight of the government interests at stake, "[n]othing in the First Amendment . . . makes the question whether the adjective 'political' can properly be attached to [nonmembers'] beliefs the critical constitutional inquiry." *Abood*, 431 U.S. at 228, 232. *Abood* also properly recognized that States have broad leeway to choose how to run their workplaces to preserve labor peace and

ensure the efficient delivery of services. The First Amendment does not take from the States the power to choose the means most conducive to these important ends.

As the next section demonstrates, *Abood* is also consistent with first principles of federalism insofar as it allows States to determine what legal regime will enable them to manage their workforces most effectively.

II. THIS COURT HAS LONG RECOGNIZED THE IMPORTANT ROLE THAT FEDERALISM PLAYS IN OUR CONSTITUTIONAL STRUCTURE.

Article I of the Constitution confers on Congress "[a]ll legislative Powers" and enumerates the specific powers encompassed by that phrase. U.S. Const. art. I. That provision, taken with the Tenth Amendment, establishes a carefully crafted balance of federal-state power. On the one hand, the federal government enjoys substantial authority to act in contexts where national action is necessary. On the other hand, there are some contexts in which the States may craft innovative policy solutions reflecting the diversity of America's people, places, and ideas, so long as those state policies are otherwise consistent with the Constitution. *Cf.*, *supra*, Section I (agency-shop arrangements do not violate the First Amendment).

This Court has long recognized this "fundamental principle" that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. As this Court explained over a century ago, "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence." *Texas v. White*,

74 U.S. 700, 725 (1868), *overruled in part by Morgan v. United States*, 113 U.S. 476 (1885); *see id.* at 726 ("the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government"); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("'State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'" (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

When the Framers drafted our enduring Constitution, this federalist system was an integral part of their design. *See* McConnell, *supra*, at 1492 ("[d]uring the debates over the drafting and ratification of the Constitution, supporters and opponents alike came to articulate complex and sophisticated theories of federalism"). As one scholar explains:

> The federal system resulted from a compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states. It was unthinkable to most eighteenth century citizens that the Constitution should abolish state governments. At the same time, the difficulties experienced under the Articles of Confederation demonstrated the need for a strong central power. Given these constraints, the Framers of the Constitution pursued the practical course: a federal system that would maintain independent state governments while giving the new central government supreme authority in certain designated areas.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3 (1988).

Indeed, although the Framers' experiences under the Articles of Confederation convinced them that the national government must be given significantly greater powers than it possessed under the Articles of Confederation government, *see, e.g.*, *The Federalist No. 3*, *supra*, at 36 (John Jay) (noting agreement on "the importance of . . . continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes"); *cf.* 2 *The Records of the Federal Convention of 1787*, at 132 (Max Farrand ed., 1911), they also recognized that a system of dual sovereignty could produce a number of benefits. Merritt, *supra*, at 3 (noting that "eighteenth century thinkers perceived several advantages in their federalist compromise"); *see* McConnell, *supra*, at 1492 (articulating "three complementary objectives" that the Framers thought "the new system of dual sovereignty would promote").

For example, the Framers recognized that in some contexts, it is better that States be able to adopt policies that are best suited to the specific needs and interests of their people. As former Judge Michael McConnell has written, "decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation." *Id.* at 1493; *see* Merritt, *supra*, at 8 (observing that one "advantage of independent state governments stems from the political and cultural diversity they provide" because "[a]cting through their state and local governments, citizens in each region create the type of social and political climate they prefer").

Moreover, when States are allowed to adopt dif-

ferent policies, they can serve as valuable testing grounds by which the country can see how effective those different policies are. McConnell, *supra*, at 1493 ("decentralization allows for innovation and competition in government"); Merritt, *supra*, at 9 (noting that state governments have repeatedly "pioneer[ed] new social and economic programs"); Charles Fried, *Federalism—Why Should We Care?*, 6 Harv. J.L. & Pub. Pol'y 1, 2 (1982) (noting that one "value" of federalism which is "quite important" is the "concept of the states as 'laboratories for experiment'"); Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1033-34 (1977) ("Although some state governments may be ignorant or venal, many are farseeing and courageous; and not all wisdom reposes in Washington.").

Related, a federalist system also ensures that in the context of those questions that do not require one uniform policy for the nation, policies can be made by those officials who are best acquainted with the unique needs and interests of their constituents. As James Madison wrote in *Federalist No. 10*, there are dangers inherent in both large and small republics: in the former, "the representative[s] [are] too little acquainted with . . . local circumstances and lesser interests," while in the latter, representatives may be unable to "pursue great and national objects." *The Federalist No. 10*, *supra*, at 77 (James Madison). A federal system, he wrote, "form[ed] a happy combination in this respect; . . . the great and aggregate interests being referred to the national, the local and particular[,] to the State legislatures." *Id.* at 77-78; Merritt, *supra*, at 9.

This Court has repeatedly recognized the benefits offered by our federalist system of government. In *Gregory*, for example, this Court observed that "[t]his

federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; [and] it allows for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458; *see New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

In short, our constitutional system recognizes that there are some contexts in which States may usefully serve as laboratories for experimentation and in which policy is best made at the State level. *Amici* believe that the question whether non-member employees may be required to pay agency fees is one such policy, as the next Section discusses.

III. CONSISTENT WITH FEDERALISM PRINCIPLES, STATES SHOULD BE ABLE TO DETERMINE FOR THEMSELVES WHETHER TO ADOPT AGENCY FEE ARRANGEMENTS.

Consistent with our federalist structure and its commitment to allowing States to govern in areas where uniform national legislation is not necessary, key aspects of labor law have long been left to the States. *See, e.g.*, Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 585 (1993) (not-

ing the "wide-ranging role still given to the states in our federal labor relations scheme"); *id.* at 584 ("the states already retain an important role in many aspects of labor relations under current law. . . . [including] whether membership or financial support of a union bargaining agent may be compelled"); Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 30 (5th ed. 2014) (noting "the complex legal environment" in public sector unionism because there is "one set of laws for federal workers and 50 sets for the states, plus numerous executive orders, local ordinances, legal rulings, provisions, and practices"); Drummonds, *supra*, at 585 ("most aspects of employment law outside the labor relations context remain subject to state regulation").

The National Labor Relations Act, for example, "leaves regulation of the labor relations of state and local governments to the States." *Abood*, 431 U.S. at 223; Drummonds, *supra*, at 584 ("NLRA leaves an issue basic to any regime of collective labor relations to state control."). While the law's legislative history provides no explanation for this decision, one theory is that the law's drafters believed that Congress "lacked the authority to regulate the labor relations of states and localities." Joseph E. Slater, *The Court Does Not Know 'What a Labor Union Is': How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 Or. L. Rev. 981, 1025 (2000); *see id.* at 1026 ("Through to the present day, courts have resisted Congressional attempts to apply federal employment laws to state and local governments.").

Whether or not Congress has the legal authority to enact legislation that would govern public sector labor relations in the States (and *amici* take no position on that question), the fact that it has not done so

reflects the deference customarily accorded state judgments in this context and is consistent with the values inherent in our federalist system. This Court has long recognized the deference that should be accorded state judgments about how to structure labor relations in their States. *See, e.g.*, *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949) ("states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law"). Indeed, that principle was an important one in *Abood* itself.

The Court began its analysis in *Abood* by examining two of its prior cases that addressed the constitutionality of agency shop arrangements in the private sector and then explained the relevance of those decisions to its consideration of Michigan's statute. Recognizing that it had previously held that Congress's "legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress" "constitutionally justified" the attendant interference with First Amendment interests, *Abood*, 431 U.S. at 222, the Court held in *Abood* that Michigan's legislative judgment was entitled to the same respect as Congress's. As the Court explained, "[t]he governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law." *Id.* at 224. Given that the "same important government interests recognized [in the private sector cases]" underpin Michigan's policy decision, those interests "presumptively support the impingement upon associational freedom created by the agency shop here at issue." *Id.* at 225.

In deciding *Abood*, this Court recognized that its "province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment." *Id.* at 224-25. Rather, the Court made clear that it should defer to Michigan's judgment about what would best preserve "labor stability" in that State. *Id.* at 229. "[T]here can be no principled basis," the Court concluded, "for according [Michigan's] decision less weight in the constitutional balance than was given in [the private sector cases] to the congressional judgment." *Id.* Thus, *Abood* stands for the fundamental proposition that the Court should defer to state judgments on this complicated policy question, at least as much as it stands for the specific balancing of state and First Amendment interests at issue in that case.

In reliance on *Abood*, States have adopted different approaches to regulating labor relations in their States. *Amici* state legislators, who are responsible for determining the proper labor regime in their respective States, appreciate the flexibility and discretion this gives States to adopt a framework that will work best for them. As this Court recognized in *Abood*, "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. . . . The decision rests with the policy makers, not with the judiciary." *Id.* at 225 n.20 (quoting *Hanson*, 351 U.S. at 234).

Tellingly, parts of Petitioners' brief read more like a policy argument against unions and collective bargaining than like a legal analysis. *See, e.g.*, Pet'rs' Br. at 36 (arguing that "[e]xclusive representation 'extinguishes the individual employee's power to order his own relations with his employer'" (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180

(1967))); *id.* at 35 ("Respondent Unions advocate numerous policies that affirmatively harm teachers who believe they are above-average."). These arguments (on which *amici* have no view) simply underscore the extent to which there are policy judgments at play in this case. *See Harris*, 134 S. Ct. at 2658 (Kagan, J., dissenting) ("For many decades, Americans have debated the pros and cons of right-to-work laws and fair-share requirements. All across the country and continuing to the present day, citizens have engaged in passionate argument about the issue and have made disparate policy choices."). Those policy judgments are best made by state officials who are knowledgeable about the history of labor relations in their State and who have the richest understanding of the complicated interests of employers and employees alike.

As *amici* state legislators know well from their experience serving in state legislatures and talking to legislators from other States, what makes sense for one State may not make sense for another State, given the competing interests at play. *See, e.g.*, Kearney & Mareschal, *supra*, at 64 (noting that "[a] variety of important issues [related to collective bargaining] had to be faced by the state lawmakers," and "[l]egislative outcomes were hammered out in fierce battles fought between public employee unions, public employers, and numerous interest groups"). Allowing these decisions to be made at the state level also means that laws can be shaped to reflect the culture and politics of the individual State. *See, e.g.*, Drummonds, *supra*, at 585 (noting that "[m]any of the states in the American South, Southwest, Plains, and Rocky Mountains areas operate under ["right-to-work"] laws now deeply imbedded in local culture"); Kearney & Mareschal, *supra*, at 68 (observing that

"[h]istory and political culture have predisposed the southern states against unions").

Petitioners argue that the divergence of State approaches undermines any claim that arrangements like the one at issue here pass constitutional muster, *see* Pet'rs' Br. 12 (noting that "public-sector unions are flourishing in the federal government and the many states that prohibit agency fees"), but this misses the fundamental point that different regimes work in different States. The Constitution does not tie the hands of state employers, denying them the discretion to choose the rules most conducive to labor stability and efficiency. That state legislators in some States have decided that their State is better served by a regime that does not allow for agency fee arrangements says nothing about whether such arrangements are critical to the stability of labor relations, and hence the effective provision of public services, in other States. Indeed, the fact that States have made different decisions about how to structure public-sector collective bargaining generally reflects the different values and belief systems of people in different States, as well as the varying histories of different States. *See, e.g.*, Kearney & Mareschal, *supra*, at 67 (observing that "[t]he states with comprehensive bargaining laws tend to share certain traits and experiences").

The Court should credit the reasoned judgment of those States that do allow for agency fee arrangements that those arrangements are an important and effective method of ensuring that unions are able to fulfill their exclusive-representation duties. This is particularly true because States have relied on *Abood* in crafting these arrangements for decades. Based on their familiarity with labor relations in their States and the laws governing public sector collective bar-

gaining, those *amici* state legislators who serve in States that allow for agency fee arrangements know how disruptive it would be if this Court were to invalidate those relationships. Relying on this Court's decision in *Abood* and its holding that public sector unions can rely on agency fees to ensure they will have the resources necessary to fulfill their duties as employees' exclusive bargaining representative, "public entities of all stripes have entered into multi-year contracts with unions containing such clauses." *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting); *see id.* ("governments and unions across the country have entered into thousands of contracts involving millions of employees in reliance on *Abood*. Reliance interests do not come any stronger."); *id.* at 2645 (noting *Abood* rule is "deeply entrenched"). A decision overturning *Abood* would interfere with all of those contracts.

A decision overturning *Abood* would also invite significant litigation in States across the country, as non-members would likely seek to recoup agency fees paid in the past. Since this Court decided *Harris v. Quinn* and held that agency fee arrangements are invalid in the context of home health care workers who are not full public employees, numerous lawsuits have been filed seeking the repayment of agency fees. *See, e.g.*, *Brown v. Brown*, No. 6:15-cv-01523 (D. Or. complaint filed Aug. 12, 2015); *Winner v. Rauner*, No. 1:15-cv-07213 (N.D. Ill. complaint filed Aug. 17, 2015); *Mentele v. Inslee*, No. 3:15-cv-05134 (W.D. Wash. complaint filed Mar. 4, 2015). The litigation that would be spurred by a decision overturning *Abood* would almost certainly be significantly greater.

In sum, *amici* know well the complicated calculus involved in determining how to structure public sector labor relations, and they know how much of that

decisionmaking is based on local interests and values. Overturning *Abood* and imposing one uniform rule on the entire country would not only cause significant disruption in the many States that use agency fee arrangements, it would also take decisionmaking on this important issue away from the state officials who are best positioned to engage in it. Nothing in the First Amendment or this Court's precedents requires that result, and the decision of the court of appeals should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

November 13, 2015 * Counsel of Record

APPENDIX

APPENDIX:

LIST OF *AMICI**

Abeler, Jim
Former Representative of Minnesota

Benton, Don
Senator of Washington

Bishop, Click
Senator of Alaska

Brown, Adam
Representative of Illinois

Bryant, Terri
Representative of Illinois

Butler, Marc
Assemblymember of New York

Cathcart, Richard C.
Former Representative of Delaware

Costa, Doreen
Representative of Rhode Island

Colver, Jim
Representative of Alaska

Davidsmeyer, C.D.
Representative of Illinois

DiGirolamo, Gene
Representative of Pennsylvania

LIST OF *AMICI* – cont'd

Duprey, Janet
Assemblymember of New York

Golden, Martin
Senator of New York

Hammond, Norine
Representative of Illinois

Hannon, Kemp
Senator of New York

Hicks, Ron
Representative of Missouri

Howard, Seth A.
Delegate of Maryland

Kay, Dwight
Representative of Illinois

Lancia, Robert B.
Representative of Rhode Island

Lanza, Andrew
Senator of New York

LaTourette, Steve
Former Representative of Ohio in the U.S. House of Representatives

Latvala, Jack
Senator of Florida

LIST OF *AMICI* – cont'd

LeDoux, Gabrielle
Representative of Alaska

Lofink, Vincent
Former Representative of Delaware

Martins, Jack
Senator of New York

McCann, Sam
Senator of Illinois

Miloscia, Mark
Senator of Washington

Mitchell, Bill
Representative of Illinois

Mullin, Kevin J.
Senator of Vermont

Muñoz, Cathy
Representative of Alaska

Murray, Dean
Assemblymember of New York

Nozzolio, Michael
Senator of New York

Oberle, Jr., William A.
Former Representative of Delaware

LIST OF *AMICI* – cont'd

Poe, Raymond
Representative of Illinois

Ra, Edward
Assemblymember of New York

Ramone, Michael
Representative of Delaware

Roach, Pam
Senator of Washington

Robach, Joseph
Senator of New York

Savage, John A.
Former Representative of Rhode Island

Saviano, Angelo "Skip"
Former Representative of Illinois

Seaton, Paul
Representative of Alaska

Smyk, Stephen T.
Representative of Delaware

Stec, Dan
Assemblymember of New York

Stevens, Gary
Senator of Alaska

LIST OF *AMICI* – cont'd

Stutes, Louise
Representative of Alaska

Thompson, Steve
Representative of Alaska

Tilton, Cathy
Representative of Alaska

Volker, Dale
Former Senator of New York

* *Amici* who no longer serve in a state legislature or Congress join solely in their individual capacities as former members of a state legislature or Congress.